

OGC REVIEW COMPLETED

MEMORANDUM FOR MR. HOUSTON

20 December 1950

SUBJECT:

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1. Reference is made to your request for a precedent to support the proposed employment of , a retired Foreign Service Officer. OPC/FE has proposed an agreement with him which will set a problem and merely ask him, at his own time, to prepare a report.

2. I have been unable to find a precedent concerning a retired Foreign Service Officer, with the obvious exception of the Brunswick case.

3. However, it seems clear that an agreement can be made without violating the dual compensation laws. The provisions which normally cause trouble are 5 USCA 58 and 62, and the following decisions of the Comptroller General provide sufficient precedent to support our agreement, insofar as the dual compensation laws are concerned:

a. As to Section 58, see 18 Comp. Gen. 768, at 772, which provides:

Salary
"... If an employee is paid on a fee basis, as distinguished from a salary basis, in either of the positions or employments, the dual compensation statute of 1916 5 USCA 58 does not apply. ..."

Therefore, payment on a fee basis should be sufficient to prevent application of this section.

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b. As to Section 62, see 26 Comp. Gen. 501, which held that engaging the services of a physician as consultant, by contract or otherwise, upon a fee basis, for services actually performed, is not an appointment to an "office to which compensation is attached" within the meaning of Section 62 (at 503). *no if didn't 9KW*

The Comptroller General pointed out that consultants SHOULD NOT perform or supervise duties and responsibilities imposed by law upon the agency, nor should they be under the administrative control of an official of the Government in the usual sense.

The decision was based on the proposition that consultants SHOULD BE employed in an advisory capacity. That is, primarily, their duties should consist of expressing their views and giving their opinions and recommendations upon particular problems and questions presented to them for consideration, in consultation or otherwise, by administrative officers of the Government.

c. For a decision concerning both sections, see 28 Comp. Gen. 217.

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d. Cases where compensation has been held a "fee" instead of a "salary:"

22 Comp. Dec. 678, concerning fees of a music teacher based on time served;

2 Comp. Gen. 37, concerning fees of a physician performing autopsies;

3 Comp. Gen. 563, concerning fees of a physician performing X-ray examinations.

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4. In view of the above cases, I believe an agreement can be made without violating the dual compensation laws. However, the possibility of suspension of [] annuity by Foreign Service officials is another matter.

5. The provisions of the Foreign Service Retirement and Disability System, 22 USCA 1061 through 1116, contain nothing which prohibits payment of an annuity to a retired Foreign Service Officer who obtains another Government position. However, the law provides that a Foreign Service Officer who is reinstated in the Service shall be entitled to full pay, in lieu of his retirement allowance (5 USCA 1111).

6. I have been unable to find anything in the Foreign Service Regulations which prohibits our proposed agreement.

7. Effect of Brunswick Case. Various memoranda in our files suggest the possibility that the Comptroller General does not follow the Brunswick Case (Brunswick v. United States, 90 Ct. Cls. 285). Nevertheless, the Comptroller General has cited this case at least twice, with apparent approval. See 20 Comp. Gen. 443, at 447, and 21 Comp. Gen. 1125, at 1127. These decisions are not exactly ideal precedents, but may be helpful in solving the [] problem.

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8. Even though the Comptroller General refuses to follow the Brunswick case, I believe it can be distinguished for our purposes. Brunswick held three temporary positions in the Government while drawing his annuity; Huddle would not be occupying a position under our proposal, and he would not even be an "employee." Consequently, his position would be stronger than was Brunswick's.

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CONCLUSION: This office should be able to draft an agreement with [] which will not violate the dual compensation laws. Assuming that Foreign Service officials will become aware of this agreement, suspension of [] annuity is a possibility. If you so desire, I shall be happy to find out what the Foreign Service officials consider a prerequisite for such suspension.

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